90-711

IN THE

Supreme Court Of The United States

October Term, 1990

LAWRENCE C. PRESLEY,
individually and on behalf of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION and
RUSSELL COUNTY COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM
SUBMITTED BY
ETOWAH COUNTY COMMISSION

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QUESTIONS PRESENTED

The questions presented are really these:

1. Under Section 5 of the Voting Rights Act, does a county resolution which does not change the entire commission's authority but merely formalizes a common road fund for use county-wide in accordance with need constitute a change in a standard, practice or procedure with respect to voting subject to preclearance?

2. Under Section 5 of the Voting Rights Act, does a local three-judge district court exceed its jurisdiction when it finds from the facts that a county resolution which did not work any change in the entire commission's authority but merely formalized a common road fund for use county-wide in accordance with need, did not constitute a change in a standard, practice or procedure with respect to voting subject to preclearance?

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MOTION TO AFFIRM

Appellee Etowah County Commission moves this Honorable Court to affirm the judgment of the United States District Court for the Middle District of Alabama pursuant to Rule 18.6, Rules of the Supreme Court of the United States. The grounds for this motion are set out below.

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STATEMENT OF THE CASE

In arriving at the decision, Judge Frank M. Johnson, Jr., writing for the three-judge court, made the following findings of fact.

FACTS

Prior to 1986, the Etowah County Commission was composed of five members, four elected at large from four residency districts, and a chairman elected at large with no residency requirement. Each of the four residency districts constituted a road district, and the commissioner from each residency district exercised complete supervision and control over the road shop, equipment, and road crew of that district. Road funds, after being initially divided up by vote of the entire commission according to a projection of the needs of each district, were subject to the individual control and discretion of each commissioner regarding priorities *within* that commissioner's district. The chairman's responsibilities were limited to overseeing the Solid Waste Authority, preparing the budget, and managing the courthouse building and grounds. A-4, Appellant's Jurisdictional Statement (hereinafter J.S.).

By consent decree in 1986[1] the Etowah County Commission is phasing in a new single-member district structure. Under this new structure, the Commission is composed of six members elected from single-member districts rather than at large. Two new commissioners were elected from single-member Districts 5 and 6 in December 1986, joining the four incumbent members elected at large from the old residency districts. One of the two commissioners elected in December 1986 is plaintiff Presley, the first and only black commissioner, from District 5; the other new commissioner is Billy Ray Williams, who is white, from District 6. When the two new commissioners took office in January 1987, the incumbent at-large chairman became a non-voting member. His term expires in January 1993 when the chairmanship will be

[1] *Dillard v. Crenshaw County*, Civil Action No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986).

rotated among the six commissioners. In 1988, elections for single-member Districts 2 and 3 were held and two of the four incumbent at-large members were elected to those seats. The current commissioners for Districts 1 and 4 are the other two incumbents from the old Commission. Thus, since January 1987 the voting membership of the Commission has consisted of the four "holdover" commissioners and the two new single-member district commissioners elected in 1986. A-5, J.S.

The 1986 consent degree provided that the two new commissioners elected in 1986 "shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large."[2] On August 25, 1987, the Etowah County Commission passed a resolution[3] ("the Common Fund Resolution") providing that

[2]See Appellant's Jurisdictional Statement, at 3, Footnote 3.

[3]On August 25, 1987, the Commission passed a resolution ("the Road Supervision Resolution") providing that each of the four holdover commissioners would continue to "oversee and supervise the road workers and the road operations assigned to the road shop" in their respective districts. The resolution further provided that the four holdovers "shall jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of the streets, roads and public ways of all of Etowah County." The resolution also provided that Presley would oversee maintenance of the county courthouse and Williams the operation of the engineering department; Presley and Williams were to share supervision of the county farmers' market. Presley and Williams voted against this resolution. A-5-6, J.S.

The district court found that the four holdovers thus retained complete day-to-day control over all county road operations, although they no longer represented the entire county, and although one of the road shops is now physically located within Presley's district. A-6, J.S. The district court held that this Road Supervision Resolution was subject to preclearance. A-20-21, J.S. In fashioning relief, the district court concluded that Etowah County should

> apply forthwith for preclearance of the 1987 Road Supervision Resolution. If Etowah County chooses not to apply, or if preclearance is not obtained within sixty days from the date of this order, (footnote omitted) Etowah County shall be enjoined from enforcing the Resolution.

A-23, J.S. Etowah County has chosen not to apply for preclearance of the Road Supervision Resolution, has repealed that resolution, and has not filed a cross-appeal with respect to that issue.

> all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, [and shall] not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County which are under the jurisdiction of the Etowah County Commission.

A-6, J.S. Presley and Williams voted against this resolution. The district court found that the effect of the Common Fund Resolution shifts control over the allocation of road funds *within* each district from the respective individual commissioners to the Commission as a whole. A-7, J.S. Nonetheless, as the district court pointed out,

> [t]he Common Fund Resolution did not, however, work any change in the entire Commission's authority, as a body, to determine the initial allocation of funds *among* the various districts. To a large extent, the Common Fund Resolution appears to have merely recast in form, without changing in substance, the manner in which the entire Commission sets budget priorities, from a system of designating funds on a district-by-district need basis to one of designating funds on a county-wide need basis without regard to district lines.

A-7, J.S. Presley urged the district court to find that prior to 1986 the four incumbent commissioners had "bargaining power" through an equal distribution of the road budget among them.[4] To the contrary ,the district court found

[4]Presley suggested he sought the political "bargaining power" that would come from having each individual commissioner control one-sixth of the county-wide road budget. A-19, J.S. Presley's district, which is centered in the city limits, contains 0.3% of the county road mileage in Etowah County. Williams' district, similarly centered in the city limits, contains 4% of the county road mileage. A-6, J.S. Of Presley's county road mileage, 1.35 miles of road is unpaved. He testified there are no dwellings on the unpaved portions of this road mileage.

> as a matter of fact, however, that the individual Commissioners were never, prior to the Common Fund Resolution, given equal prorated shares of the budget over which they could exercise exclusive individual control, such that subsequent shifts in budget allocation among the districts proceeded on some kind of "horse-trading" basis. Rather, at most, the individual Commissioners may have been able to set priorities regarding the expenditure of whatever portions of the road budget the entire Commission saw fit to allocate to their respective districts.

A-19, J.S. The district court held that the Common Road Fund Resolution was not subject to preclearance under Section 5 of the Voting Rights Act. A-20, J.S. In so holding, Judge Frank M. Johnson, Jr., wrote

> It is clear that the power to set the internal spending priorities of a given quantum of budget authority pales dramatically in comparison to the power to allocate the *amount* of such budget authority in the first place. In view of the fact that the authority reallocated by the common fund resolution constituted, at most, only a small portion of one aspect of Etowah County's governmental powers, we conclude that the reallocation was simply too minor and inconsequential to amount to a change affecting voting. The common fund resolution effected no shift in authority between officials with different constituencies as to the overwhelmingly decisive and controlling budgetary powers exercised by the Etowah County Commissioners, because such ultimate budgetary powers have always been exercised by the entire Commission.

A-19, J.S.

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED

I. The Common Fund Resolution did not change standards, practices or procedures with respect to voting nor did it reallocate authority in a manner that has any significant potential impact on voting rights and thus is not subject to preclearance under Section 5 of the Voting Rights Act.

Preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is required when a state or political subdivision seeks to change a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964." See 42 U.S.C. § 1973c. Preclearance for such a change is sought by requesting the approval of the United States District Court for the District of Columbia or the Department of Justice. See 42 U.S. C. § 1973c.

Where preclearance is not sought and a three-judge court is convened, the inquiry is "(1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied,[5] and (3) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984).

While Section 5 is to be given broad scope, *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175-76 (1985); *Allen v. State Board of Elections*, 393 U.S. 544, 566-67, "[t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138 (1976), quoted in *McCain v. Lybrand*, 465 U.S. 236, 245, quoted in *Lucas v. Townsend*, 698 F.Supp. 909, 911 (M.D. Ga. 1988), aff'd without opinion, ___ U.S. ___, 107 L.Ed.2d 943 (1990). It is established that Section 5 reaches only changes with a potentially discriminatory impact on voting. *Beer v. United States*, 425 U.S. 130, 138-39 (1976).[6]

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[5]It is stipulated that the Common Fund Resolution was not precleared.

[6]See also *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32, 42 (1978); *Allen v. State Board of Elections*, 393 U.S. 544, 558-59 (1969).

Recently, this Court affirmed the decision of the three-judge court in *Lucas v. Townsend*, 698 F.Supp. 909 (M.D. Ga. 1988), ___ U.S. ___, 107 L.Ed.2d 943 (1990), where the district court found that a school board's exercise of discretion in formulating a question (on a general obligation bond) to be submitted to the electorate did not constitute a standard, practice or procedure affecting voting. *Lucas*, 698 F.Supp. at 912. In reaching its decision, the three-judge court observed that the discretionary decision to determine the form of the bond referendum is a "normal legislative decision unrelated to the process of holding elections." *Lucas*, 698 F.Supp. at 912, citing the Brief for United States as Amicus Curiae at 17.

Guided by these principles, the three-judge court in the instant case concluded that the Common Fund Resolution is not a change affecting voting. Although the court found that the Common Fund Resolution shifted control over the allocation of road funds *within* a district from priority-setting by the individual commissioner to the commission as a whole, the court further found that the purported change (as measured against the benchmark of the 1964 regime modified by any intervening precleared changes) "did not, however, work any change in the entire Commission's authority, as a body, to determine the initial allocation of funds *among* the various districts." A-7, J.S. In other words, prior to the Common Fund Resolution, the entire commission voted on the allocation of the funds on a district-by-district need basis; after the resolution, the entire commission voted on the allocation of funds on a county-wide need basis.

Presley argues that the Common Fund Resolution reallocates governmental powers or authority among public officials and that such a reallocation of power is a change subject to preclearance under Section 5. To support this argument he relies on *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984), and several district court decisions.[7]

[7] *Horry County v. United States*, 449 F.Supp. 990 (D. D.C. 1978); *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D. D.C. 1983); *Hardy v. Wallace*, 603 F.Supp. 174, 178-79 (N.D. Ala. 1985).

These decisions do not stand for the proposition that any or all reallocations of authority, however slight, are subject to preclearance.[8] And, in contrast to the Common Fund Resolution, each of these decisions directly affected the voting rights of the electorate.

In contrast to the Common Fund Resolution which does not affect the power of the electorate to vote for a public official who can vote on the budgetary allocations for road repair, *Allen* involved (1) a change from an elected county superintendent of education to one appointed by the board of education; (2) a change from district to at-large voting, and (3) a change in candidate qualification requirements. *McCain* involved a 1966 change in county government from a three-member board of county

[8] See the Amicus Brief of the Attorney General in *Lucas v. Townsend*, 698 F.Supp. 909 (M.D. Ga. 1988), aff'd without opinion ___ U.S. ___, 107 L.Ed.2d 943 (1990), where the Attorney General argued:

> At the same time, the content of legislation passed by local decision making bodies which is unrelated to voting — such as what budget to approve or what programs to fund — is not subject to preclearance under § 5 of the Voting Rights Act. As long as the substance of such legislation does not itself effect a change in the method or effectiveness of the vote or the election process, it is not a "standard, practice or procedure with respect to voting" under § 5 of the Voting Rights Act.

Brief for the United States as Amicus Curiae at 8-9. The Attorney General further explained

> [t]hus, a state law that changes the method of selecting city councils from single-member districts to at-large voting is subject to § 5; in contrast, adoption of a new sales tax, a particular budget, a road-building program, or any number of other substantive enactments which do not concern voting itself, is not subject to § 5.

Brief for the United States as Amicus Curiae at 10. The Attorney General concluded that

> [t]here is, however, no basis for transforming § 5's concern with voting rights and procedures into a review of substantive policy decisions which do not themselves concern these voting rights and procedures.

Brief of the United States as Amicus Curiae at 12-13. Accordingly, the Attorney General recommended that the three-judge district court judgment be summarily affirmed.

commissioners consisting of a county supervisor, elected at large, and two gubernatorial appointments to a new form of government consisting of a three-member county council elected at large, though the candidates ran from their residency districts.

The district court decisions do not require preclearance in all matters where there is some insignificant reallocation of authority. *Horry County v. United States*, 449 F.Supp. 990 (D. D.C. 1978), involved a change from a six-member board of county commissioners appointed by the governor upon the recommendation of the county legislative delegation to the establishment of an at-large county council-administrator form of government. Clearly, such a change "necessarily affect[ed] the voting rights of the citizens of Horry County." *Horry*, 449 F.Supp. at 995. *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D. D.C. 1983), involved a change from gubernatorial and general assembly control of county affairs to a county council elected at-large by county voters. Finally, *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985), involved a change from the appointment of racing commissioners by the local legislative delegation to the appointment of those commissioners by the governor. The court found this change covered by § 5 because it reallocated authority over an agency handling the bulk of the county's revenue from officials subject to indirect local control and chosen by legislators responsible only to local voters, to officials chosen by the governor. *Hardy*, 603 F.Supp. at 179. Judge Vance, writing for the court in *Hardy*, cautioned, however, that

> [t]he ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the make-up, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of Section 5, even given its broadest interpretation.

Id. at 178-79. Moreover, the court further emphasized that

> our conclusions in this case are reached within the ambit of its peculiar facts. They should not be read to support a requirement of Section 5 preclearance in the myriad of conceivable situations that are somewhat analogous but lack the attributes that we have expressly found to be determinative.

Id. at 179.

Having examined these decisions, the three-judge court in the instant case concluded

> that reallocations of authority will generally be held to affect voting in a manner sufficient to subject them to preclearance under section 5 where they effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters. The potential for discrimination in most such reallocations derives from the fact that identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies. This general principle must be tempered, however, by *Hardy*'s implicit admonition that relatively minor or inconsequential reallocations of authority, even though involving some shift in authority between local officials with different constituencies, will not *invariably* rise to the level of a change with significant potential impact on voting rights.

A-13-14, J.S. Having concluded that not all shifts in authority between local officials necessarily effect a significant potential impact on voting rights, the three-judge court correctly concluded that the Common Fund Resolution, though a minor shift in the authority of all of the commissioners, did not rise to the level of a change affecting voting subject to preclearance.

II. The three-judge court did not usurp the role of the District Court for the District of Columbia or the Attorney General when it found from the facts that the Common Fund Resolution did not work a change in a standard, practice or procedure with respect to voting and thus was not subject to preclearance.

The role of the three-judge court under Section 5 of the Voting Rights Act has been explained as one which deals with the

question: Is the change at issue a change in a standard, practice or procedure *with respect to voting*, in other words, is it a "change affecting voting", i.e., is it a change "covered" by the Voting Rights Act? See *Allen*, 393 U.S. at 558-59, 563; *Beer*, 425 U.S. at 138-39; *McCain*, 465 U.S. at 250 n.17. In determining if a change triggers Section 5's scrutiny, the question is whether the change has a potentially discriminatory impact on voting. *Beer*, 425 U.S. at 138-39; see also *Dougherty*, 439 U.S. at 42.

The three-judge court must examine the facts of the purported change, identify the benchmark against which to evaluate the purported change, and evaluate the purported change in light of the law to determine coverage. This is what the three-judge court has done with respect to the Common Fund Resolution of Etowah County. Judge Frank M. Johnson, Jr., writing for the court, identifies a reallocation of authority but finds that it "was simply too minor and inconsequential to amount to a change affecting voting." A-19, J.S. The court undertook the task it was called upon to do, that is, determine *coverage* under the Voting Rights Act.

Presley appears to argue that the court went beyond its role and crossed over into the "substantive discrimination" analysis reserved for the Attorney General or the District Court for the District of Columbia. In support of this argument, he relies on the *Allen* decision arguing that "this Court has held firm to the standard first expressed in *Allen* that even 'minor' changes affecting elections and voting must be precleared." J.S. at 8. However, what Presley seems to ignore is that the question remains: Is it a change, however minor, *affecting voting*. Instead, Presley focuses on the phrase "too minor and inconsequential" rather than on the entire sentence "too minor and inconsequential *to amount to a change affecting voting*." A-19, J.S. The court did *not* say it was a minor change affecting voting but too minor to be subject to preclearance. Rather, the court determined that the shift in authority was too minor and inconsequential *to amount* to a change affecting voting, and thus, was not covered under the Voting Rights Act and, accordingly, was not subject to preclearance.

In sum, the three-judge court's determination that the Common Fund Resolution of Etowah County was not a change affecting voting is correct and should be affirmed.

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